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February 12, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 29, 2002
Case No.: TIA-0012

XXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits on behalf of XXXXXXXXXXXX, his late brother (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, we have concluded that the DOE Office of Worker Advocacy determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. Parts A and D of the Act provide benefits to certain workers.

Part A of the Act provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. See 42 U.S.C. § 73841(1).

Part D of the Act provides for a DOE program to assist "Department of Energy contractor employee[s]" in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C.

§ 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Pursuant to an Executive Order, the DOE has published a list of facilities covered by the Act and has designated next to each facility whether it falls within the Act's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's published list also refers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069 (citing www.eh.doe.gov/advocacy).

This case concerns Part D of the Act, the portion of the Act that provides for DOE assistance to DOE contractor employees in filing for state workers' compensation benefits. Part D establishes a DOE process through which independent physician panels consider whether employee illnesses were caused by exposure to toxic substances at DOE facilities. If a physician panel issues a determination favorable to the employee, the DOE assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The application for DOE assistance in filing for state workers' compensation benefits states that the worker was employed at the Vitro Manufacturing plant in Canonsburg, Pennsylvania, from

1/ See www.eh.doe.gov/advocacy.

2/ See Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

approximately 1942 to 1945. The DOE Office of Worker Advocacy determined that the worker was employed by an atomic weapons employer, not a DOE contractor. See September 10, 2002 Letter from DOE Office of Worker Advocacy. Accordingly, the DOE Office of Worker Advocacy determined that the applicant was not eligible for DOE assistance in filing for state workers' compensation benefits. In his appeal, the applicant contests that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from an application for such benefits. A DOE decision that an applicant is not eligible for DOE assistance does not affect (i) an applicant's right to file for state workers' compensation benefits without DOE assistance or (ii) whether the applicant is eligible for state workers' compensation benefits under applicable state law.

Similarly, we emphasize that an application for DOE assistance in filing for state workers' compensation benefits is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning DOE assistance in filing for state workers' compensation benefits does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for DOE assistance in filing for state workers' compensation benefits.

B. Whether the Applicant is Eligible for DOE Assistance in Filing for State Workers' Compensation Benefits

In order to be eligible for DOE assistance in filing for state workers' compensation benefits, the worker must be a "Department of Energy contractor employee." 42 U.S.C. § 7385o(b). The term "Department of Energy contractor employee" is defined in relevant part as:

An individual who is or was employed at a Department of Energy facility by -

(i) an entity that contracted with the Department of Energy to provide management and operating, management and integration, or environmental remediation at the facility; or

(ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility.

42 U.S.C. § 73841(11)(B); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). A "Department of Energy facility" is defined in relevant part as:

[A]ny building, structure, or premise, including the grounds upon which such building, structure, or premise is located -

(A) in which operations are, or have been, conducted by, or on behalf of, the Department of Energy ... and

(B) with regard to which the Department of Energy has or had -

(i) a proprietary interest; or

(ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction or maintenance services.

42 U.S.C. § 73841(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2).

During the period of the worker's employment, 1942 to 1945, the Vitro Manufacturing plant was not a DOE facility. For the period 1942 to 1957, the DOE's published list of facilities designates Vitro Manufacturing as "AWE" and "BE," the codes for "atomic weapons employer facility" and "beryllium vendor." 67 Fed. Reg. 79,073. The DOE Office of Worker Advocacy web site

describes the Vitro Manufacturing plant as a private uranium milling facility during that period. 3/ The web site states that the site is one of 24 former uranium mill sites designated for DOE remediation under the Uranium Mill Tailings Radiation Control Act (UMTRCA), see 42 U.S.C. 7901 et seq. The foregoing description is consistent with a description provided by the DOE Office of Environmental Management. 4/ Thus, during the period 1942 to 1957, the DOE did not conduct operations at the facility, did not have a proprietary interest in the facility, and did not have a management, environmental remediation, construction, or maintenance contract with the firm. Accordingly, for that period, the Vitro Manufacturing plant does not fall within the definition of a DOE facility, 42 U.S.C. § 7385o(1)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2) (emphasis added). 5/

As the foregoing indicates, the worker was not a DOE contractor employee and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) any other available form of relief.

3/ See www.eh.doe.gov (Facility Info/Searchable List of Covered Facilities).

4/ See www.em.doe.gov (Featured Items/Considered Sites Database).

5/ Although the DOE's published list of facilities correctly describes the Vitro Manufacturing plant for the period 1942 to 1957, the list does not address the site's status as a DOE facility during DOE environmental remediation activities pursuant to UMTRCA. Accordingly, we believe that, although not relevant to the instant case, the description of the site should be augmented.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0012 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 12, 2003

